

FAMILY LAW SECTION

Respectfully submits the following position on:

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HB 4672 & HB 4673

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The Family Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Family Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Family Law Section is 2,481.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 21. The number who voted in favor to this position was 19. The number who voted opposed to this position was 0.

Report on Public Policy Position**Name of section:**

Family Law Section

Contact person:

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Bill Number:

HB 4672 (Walsh) Family law; marriage and divorce; division of property in divorce; enact statutory standards. Amends secs. 18 & 19 of 1846 RS 84 (MCL 552.18 & 552.19).

HB 4673 (Walsh) Family law; marriage and divorce; division of property on divorce; enact statutory standards. Amends sec. 1 of 1949 PA 42 (MCL 552.401).

Date position was adopted:

June 15, 2011

Process used to take the ideological position:

Position adopted after an electronic discussion and vote

Number of members in the decision-making body:

21

Number who voted in favor and opposed to the position:

19 Voted for position

0 Voted against position

0 Abstained from vote

2 Did not vote

Position:

Oppose

Explanation of the position, including any recommended amendments:Codification actually changes the law

It appears these bills have been represented to be a codification of current law, and that this codification was necessary to bring stability and predictability to property division in divorce. Ironically, codification itself has a destabilizing effect on the law because it trumps all previous cases. Families going through divorce become the guinea pigs for the new law as the courts create a whole new body of case law to interpret the statute. This adds to the stress and expense of a process that is already stressful and expensive.

These particular bills do not codify current law. They make substantial changes to the law of property division to force courts to make unfair divisions of property.

The principles of property division are relatively well-settled

The case of *Reeves v Reeves*, 226 Mich App 490 (1997), emphasized the differentiation of marital and separate property, and restricted the courts to two bases for awarding separate property to the non-owning spouse. The Reeves court pointed to MCL 552.23, allowing the court to award separate property if the division of marital property is insufficient for the suitable support and maintenance of a party and to MCL 552.401, allowing the court to award separate property to the non-owning party if that party contributed to the acquisition, improvement, or accumulation of the property. In the fourteen years since the Reeves decision the courts have affirmed and refined the application of its principles. The arguments over the classification of property involve factual disputes rather than disputes over the state of the law.

HB 4672 and HB 4673 change current law to sanctify non-marital (separate) property

The thrust of the two bills is to repeal the two current provisions of the law that allow a court to distribute one party's separate property to the other party. HB 4673 amends MCL 552.401 to eliminate any reference to seeking an equitable result, and to eliminate the ability to award one party's separate property to a spouse who contributed to the acquisition, improvement or accumulation of the property. The court is limited to the rules as set forth in MCL 552.19, as amended by HB 4672.

HB 4672 is not easily intelligible, but the thrust of the bill is to amend MCL 552.19 to eliminate the ability of the court to award any of a party's separate property to the other party. This equitable power is replaced by complex and arbitrary rules for differentiating non-marital from marital property, and a new concept of "reasonable compensation" that treats a spouse like an employee, rather than a marital partner.

HB 4672 allows one party to unilaterally set the date for financial separation, and is devastating to home-making spouses

Under current law, the court has discretion to determine an appropriate date for the financial separation of the parties based on all of the circumstances of the case. HB 4672 amends MCL 552.19(1) (p.2, line 24 to p.3, line 7) to allow one party to unilaterally determine that date by filing a complaint for divorce. A spouse expecting a large bonus or a dramatic raise could file in anticipation of that event and receive these benefits as separate property. There is no requirement that the other party even have notice of the divorce, so the filing party can dupe the innocent party into depleting marital assets while keeping their separate assets intact.

This provision will have a devastating effect on home-makers whose spouses are the primary or sole wage-earners for the family. As soon as the divorce complaint is filed, the family's income becomes the separate property of the wage-earning spouse, leaving the home-maker with no ability to meet household expenses until they can get a court order for support.

Oddly, the rule proposed for stock awards or stock options (p. 3, line 8 to p.4, line 1) extends the end of marital covertures to the date of judgment (as opposed to the date of the complaint for divorce) for this type of property. Because this is a statute, and not a principle of caselaw, only stock options or stock awards will be covered by this provision. If an employer names this type of benefit "ownership incentive" or some similar name, the statute will not apply to the benefit.

HB 4672 sets out new, confusing and unfair rules for commingling property

The new subsection (3) of the bill (p.4, line 2 to p. 5, line 2) sets out new rules for commingled property. It is not easily intelligible, so there is no certainty regarding how it will be interpreted, but part A states that if one type of property is contributed into another type of property, the classification of the contributed property “is transmuted to” the classification of the commingled property. Transmutation is a new concept in the law of property division, and there is no definition in the bill. Does this mean that a spouse could turn one million dollars of marital property into their separate property by contributing one thousand dollars of separate property to it?

Subsection (B) sets up new tracing rules for contributions of property and effort by one spouse to the other’s non-marital property, and the new concept of “reasonably compensated.” The point of the section is to preserve the non-marital classification of property, no matter how unfair the result or difficult the tracing. There is no definition of the type of compensation to be considered in determining whether a spouse has been “reasonably compensated” for their contribution. If one spouse made all of the mortgage, tax and insurance payments on a home the other spouse brought into the marriage, would the paying spouse be “reasonably compensated” by being able to live there rent free? Do spouses now have quantum merit claims for the value of housekeeping services? The new concepts will tend to sow confusion in the law rather than bringing stability and predictability.

The new concepts also seem designed to force the court into unfair results. For example, suppose a husband brings a small business into a marriage, worth about \$10,000. During 25 years of marriage, both spouses work equally hard at the business, and the business grows to \$10,000,000. The doctrines of HB 4672 require the court to award the entire business to the husband as his non-marital property, subject to the wife’s claim for “reasonable compensation” for her work. Thus, the wife is not treated as a marital partner, but rather as an employee of the husband.

The bill also contains a provision that anticipates that non-marital property that remains individually titled can be deemed to have been transferred into some form of co-ownership: “non-marital property that is transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or in some form of co-ownership . . .” (p.3, lines 2-4)

Without a clearer explanation of its intent, this is a provision that begs litigation.

HB 4672 deprives the court of the power to award non-marital property to the non-owning spouse

Subsection 19(4) requires the court to assign each party’s nonmarital property to that party. Nonmarital property is defined in subsection 19(5) (p.6, l.14 to p.7, l. 11). It includes the increase in value of certain property, even if the increase in value is due to “the personal effort of a spouse”. This means that an inheriting spouse could quit his/her job and work instead at increasing the value of their non-marital property. The other spouse’s wages will be marital, but the increase in value of the inherited property will be separate.

HB 4672 changes the factors for dividing marital property

Subsection 19(4) sets out new considerations for the division of marital property, and eliminates existing factors. Provision 19(4)(i) restricts the court’s ability to award require one party to pay the other’s attorney fees, because the fees must be deducted from the marital estate (never a party’s nonmarital estate) and taken into consideration in the overall division. The current factor “past relations and conduct of the parties” is eliminated as a factor, so that either party’s egregious conduct toward the other must be ignored by the court. This will be beneficial to bad

spouses. Many new factors are introduced, which will render current caselaw completely inapplicable. This will destabilize the law and invite litigation to interpret the new rules.

The passage of HB 4672 and HB 4673 would unsettle the law, undermine the idea of marriage as a partnership, and benefit bad and selfish spouses. The Family Law Section opposes these bills.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2011-HB-4672>

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